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In the United States Court of Claims

(Decided November 8, 1955)

Appeal No. 4-54

THE CHOCTAW NATION v. THE UNITED STATES

Mr. W. F. Semple for the appellant. *Mr. Wesley E. Disney* was on the brief.

Mr. Robert E. Fraley, with whom was *Mr. Assistant Attorney General Perry W. Morton*, for the appellee.

ON APPEAL FROM THE INDIAN CLAIMS COMMISSION

MADDEN, *Judge*, delivered the opinion of the court:

The appellant sought, before the Indian Claims Commission, to recover the value of 6,589,000 acres of land lying between the Canadian and Red Rivers, and extending from the 100th meridian, west longitude, more than 200 miles to the west. The appellant claims that it became the owner of this land by a grant from the United States in the treaty of Doak's Stand of October 18, 1820, 7 Stat. 210, and that it conveyed it to the United States by the treaty of June 22, 1855, 11 Stat. 611, receiving no consideration for its conveyance.

The Government's position is that the appellant never owned the land in question; that the Supreme Court of the United States so decided in prior litigation between the appellant and the United States, 179 U. S. 494; and that that decision makes the instant claim *res adjudicata*. The Indian Claims Commission sustained the Government's plea of *res adjudicata* and dismissed the appellant's petition. The appellant has brought the case here, insisting that the dismissal of its petition was erroneous.

The prior suit, the decision in which was held by the Indian Claims Commission to be a bar to the present one, was not a suit for the land with which the present case is concerned. It related to lands lying east of the 100th meridian. The reason why the Supreme Court considered, in that case, the Choctaws' claim of ownership of the land lying west of the 100th meridian, is stated in the Court's opinion as follows, 179 U. S. at page 503:

> The Choctaws also contend that they once owned, by transfer from the United States, a vast body of lands west of the Leased District, for which they have never received anything, and that the treaty of 1866 must be interpreted in the light of that fact. What connection such a fact, if it had any existence, could have with the construction of the treaty of 1866 it is not easy to perceive. But as the proposition just stated was the subject of much consideration in the Court of Claims, and as it is earnestly pressed upon our attention, we will first inquire whether the Choctaws ever owned any lands west of the Leased District, that is, west of the 100th degree of west longitude, and then bring into view the circumstances leading up to the treaty of 1866 which, it is argued, throw light on its interpretation. This being done, we will examine the provisions of that treaty so far as they bear upon the title to the particular lands in dispute.

The opinion then devotes eight pages to the consideration of the question and comes to the definite conclusion that the Choctaws did not at any time own the lands west of the 100th meridian. As is apparent from the quoted statement, and from the decision of this court, 34 C. Cls. 17, the Choctaws, in the former case, presented the question of their ownership of the lands involved in the instant case for decision, not because that was the ultimate question to be decided in the former case, but because they thought that if they could establish ownership of those lands, it would be strong evidence to support their interpretation of the treaty there involved. They persuaded this court that they did own the lands west of the 100th meridian, and the fact of that ownership was a factor in inducing this court to interpret the treaty there in question as they wanted it interpreted. They pressed the same arguments upon the Supreme Court, but did not succeed in convincing that Court. The Supreme Court

also decided the ultimate question against them. It might have done so even if it had found that they had owned the lands west of those there in question. From the statement above quoted "What connection such a fact, if it had any existence, could have with the construction of the treaty of 1866 it is not easy to perceive", it may be inferred that the Court's conclusion on the intermediate fact did not affect its ultimate decision.

However that may be, the Choctaws presented the question for decision, it received detailed and careful consideration and was, in fact decided. We think they have had their day in court on the question. We think the situation is fairly comparable to that of a prior decision which is rested on two grounds. Although the decision would probably have been the same if either one of the grounds had been lacking, yet that does not make both or either of the grounds *obiter dictum*. *United States* v. *Title Insurance and Trust Company*, 265 U. S. 472, 486. The situation is also comparable to that of a case in which a court considers and decides a question presented to it as one step in the logical development of its ultimate decision. It then passes on to the next question, and its decision of that question is such that the ultimate decision would have been the same if the preceding question had not been decided at all, or had been decided the other way. But the question was presented and decided and is *res adjudicata*. *Railroad Companies* v. *Schutte*, 103 U. S. 118, 143.

The appellant urges that, even if the other requirements for *res adjudicata* were fulfilled, the doctrine is not applicable in this case because the law has been changed since the prior decision. The appellant says that the Indian Claims Commission Act of 1946, by its clause (5) of Section (2) which permits recovery on the basis of fair and honorable dealings, has changed the applicable law since the prior decision of the Supreme Court. See *The Western (Old Settler) Cherokee Indians* v. *United States*, 114 C. Cls. 716.

As we have said, the appellant claims that it acquired the lands involved in this suit by grant from the United States in the treaty of 1820 and that it granted them back to the United States without consideration in the treaty of 1855. If in fact the lands were not granted to it by the treaty of

1820, there was no lack of fair and honorable dealing in the United States taking a quit claim conveyance from the appellant in the treaty of 1855 to put to rest an unfounded claim.

The treaty of 1820 contained the expansive language about the source of the Canadian river, which was more than 250 miles west of the 100th meridian. In 1819 a treaty had been made with Spain recognizing the lands west of the 100th meridian as Spanish territory. This treaty was not ratified until 1821.

In the prior case the Supreme Court said, 179 U. S. at page 508:

> It cannot be doubted that the purpose of Article 2 of the treaty of 1830 was to provide for a special grant to the Choctaws of the lands intended to be ceded to them by Article 2 of the treaty of 1820, and no others. It was as if the parties declared that the words in the treaty of 1820, "thence up the Arkansas to the Canadian Fork, and up the same to its source, thence due south to the Red River," should be held to mean the same as the words in the treaty of 1830, "thence to the source of the Canadian Fork, *if* in the limits of the United States, *or to those limits, thence* due south to Red River". The treaty of 1830 plainly imports the understanding of the parties at that time that whatever might be the wording of the treaty of 1820, the United States had not thereby intended to grant, and the Choctaws had not thereby expected to receive, any lands at or near the source of the Canadian Fork unless that point was within the limits of the United States—that both parties had in view at that time only lands within the limits of the United States.
>
> As the treaty of 1820 provided that the Choctaws should have lands as far west as the source of the Canadian River, it is suggested that the United States could not legally modify that provision by the subsequent ratification in 1821 of the treaty with Spain signed in 1819. But it was entirely competent for the parties, without any new or valuable consideration intervening, to rectify a mistake in the description of boundaries, and to agree, as in effect they did by the treaty of 1830, that the words "to the Canadian Fork, and up the same to its source," in the treaty of 1820, were to be interpreted as meaning "to the source of the Canadian Fork, if in the limits of the United States, or to those limits"—thus relieving the United States from any obligation to make a special grant to the Choctaws of lands which by the treaty with

> Spain, ratified in 1821, had been recognized as part of Spanish territory. After the treaty of 1830 the line "thence due south to the Red River" was to be taken as running from a point on the dividing line between the United States and Spain, the 100th degree of west longitude as established by the treaty of 1819–1821, *thence due* south to that river.

Thus the Supreme Court considered the intention of the parties to the treaty of 1820, and decided that they did not intend, in spite of the language which they used, that the grant should extend west of the 100th meridian. On that assumption, the Government's acceptance, without any separate consideration, of the appellant's quit claim in 1855 of its then asserted title, the only foundation of which was some language used by mutual mistake, involved no lack of fair and honorable dealing.

The Supreme Court considered and decided the very question which the appellant would have the Indian Claims Commission decide again, and differently. We think the Commission was correct in sustaining the Government's plea of *res adjudicata* and we affirm its decision.

It is so ordered.

LARAMORE, *Judge;* WHITAKER, *Judge;* LITTLETON, *Judge;* and JONES, *Chief Judge*, concur.

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In the Supreme Court of the United States

Term, 19[redacted]

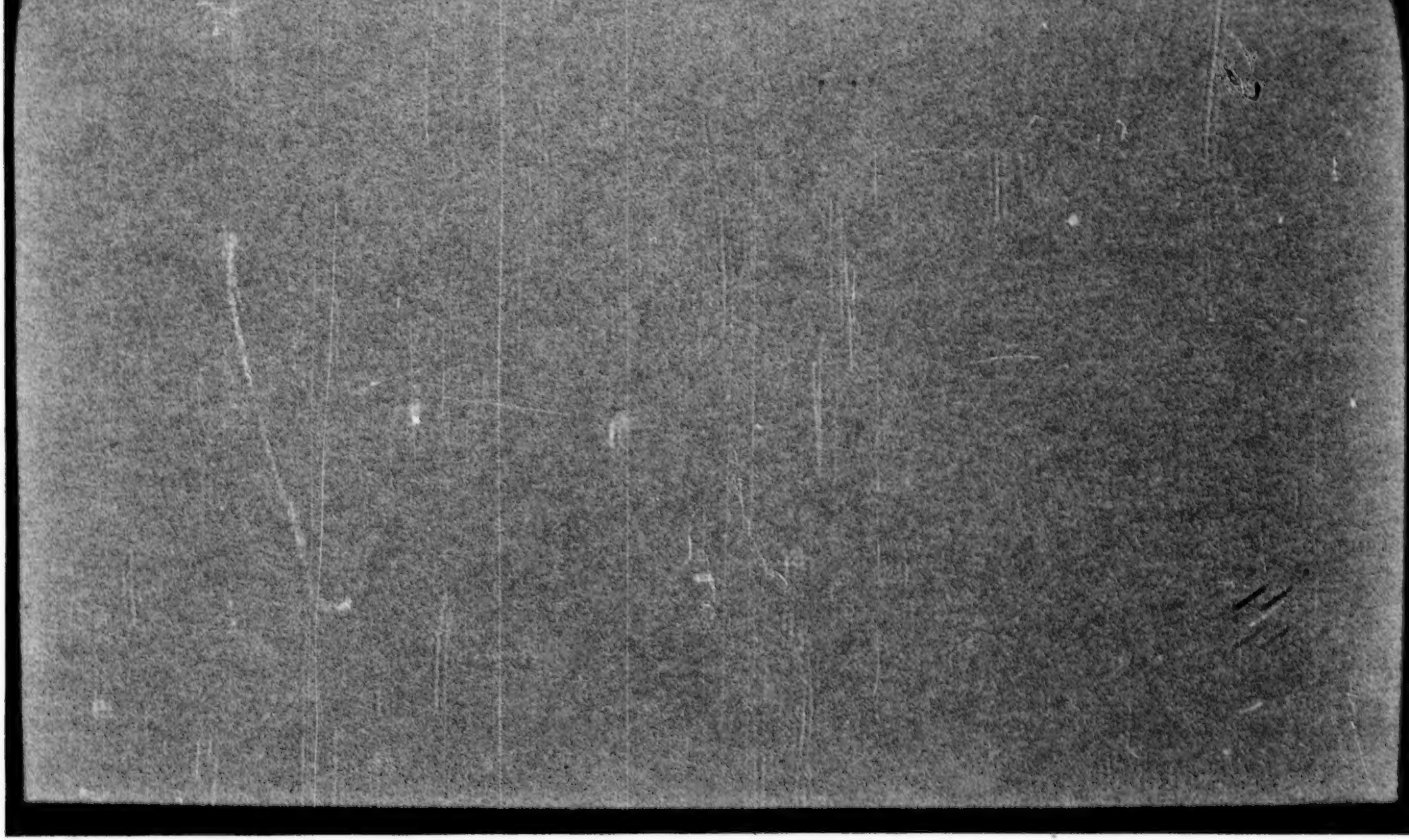
THE CHOCTAW NATION, *Petitioner*,

vs.

THE UNITED STATES, *Respondent*.

PETITION for WRIT of CERTIORARI
TO THE UNITED STATES COURT OF CLAIMS.

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IN THE SUPREME COURT OF THE UNITED STATES.

..... Term, 19.....

No. .....

THE CHOCTAW NATION, *Petitioner,*

vs.

THE UNITED STATES, *Respondent.*

PETITION FOR *CERTIORARI* TO THE UNITED STATES COURT OF CLAIMS.

Petitioner prays that a writ of *certiorari* issue to review the judgment entered by the United States Court of Claims on November 8, 1955.

Opinion Below.

The opinion of the Court of Claims is shown in the transcript. It is reported in 135 Fed. Supp. 536. Nine extra printed copies are being filed.

Jurisdiction.

The petitioner within due time and on December 7, 1955, filed its motion for a new trial. On January 31, 1956, the court overruled the motion for new trial. On April 18, 1965, the Chief Justice granted an extension of time within which to file petition for *certiorari,* extending the time to and including May 25, 1956.

Jurisdiction is invoked under Title 28, U. S. C. A., Sec. 1255.

Questions Presented.

The decisive questions are:

(*a*) Did the Court of Claims commit error in sustaining the plea of *res judicata?*

(*b*) Did the Court of Claims err in holding that petitioner did not have a cause of action arising under the fair and honorable dealing clauses of the Indian Claims Commission Act?

Statutes and Treaties Involved.

There are involved the following statutes and treaties, namely:

(*a*) Treaty of Doak's Stand of October 18, 1820 (7 Stat. 210), the pertinent part reading:

> "A tract of country west of the Mississippi river, situate between the Arkansas and Red River and bounded as follows: Beginning on the Arkansas river, where the lower boundary line of the Cherokees strikes the same; thence up the Arkansas to the Canadian fork, and up the same to its source; thence due south to the Red river; thence down Red river three miles below the mouth of Little river, which empties itself into Red river on the north side; thence a direct line to the beginning."

(*b*) Treaty of January 20, 1825 (7 Stat. 234), the pertinent part reading:

> "Whereas a Treaty of friendship, and limits, and accommodation, having been entered into at Doake's Stand, on the eighteenth of October, in the year one thousand eight hundred and twenty, between Andrew Jackson and Thomas Hinds, Commissioners on the part of the United States, and the Chiefs and Warriors of

the Choctaw Nation of Indians; and whereas the second article of the Treaty aforesaid provides for a cession of lands, west of the Mississippi, to the Choctaw Nation, in part satisfaction for lands ceded by said Nation to the United States, according to the first article of said treaty: * * *."

(*c*) Treaty of September 27, 1830 (7 Stat. 333), the pertinent part reading:

"* * * beginning near Fort Smith where the Arkansas boundary crosses the Arkansas River, running thence to the source of the Canadian fork; if in the limits of the United States, or to those limits; thence due south to Red River, and down Red River to the west boundary of the Territory of Arkansas; thence north along that line to the beginning."

(*d*) Act of Congress of June 22, 1855 (11 Stat. 611), the pertinent part reading:

"Art. 9. The Choctaw Indians do hereby absolutely and forever quit-claim and relinquish to the United States all their right, title, and interest in and to any and all lands, west of the one hundredth degree of west longitude; * * *."

(*e*) Act of Congress of March 2, 1895 (28 Stat. 876), the pertinent part reading:

"That as the Choctaw and Chickasaw Nations claim to have some right, title and interest in and to the lands ceded by the foregoing agreement (the agreement above referred to), which claim is controverted by the United States, jurisdiction be and is hereby conferred upon the Court of Claims to hear and determine the said claim of the Choctaw and Chickasaw Nations, and to render judgment thereon * * *."

The land hereinabove referred to being lands involved

in the so-called Leased District. For plat and diagram of land see page 500 of 179 U. S.

(*f*) Treaty of April 28, 1866 (14 Stat. 769), this being the treaty covering the lands involved in the Leased District, plat for which lands appears at page 500 of 179 U. S. and being the lands between the 98th and 100th Meridian.

Statement of Case.

Petitioner in this case seeks to recover the value of 6,589,000 acres of land lying west of the 100th Meridian, claiming that it was granted to petitioner by the treaty at Doak's Stand of October 18, 1820 (7 Stat. 210). Defendant interposed the plea of *res judicata,* relying upon statements in *Choctaw Nation* v. *United States,* 179 U. S. 494, 45 L. ed. 291. The Indian Claims Commission sustained that plea, and the Court of Claims affirmed.

By the treaty of Doak's Stand the Choctaws, then domiciled in Mississippi, and yielding to great pressure to effect their removal to a new domain in the West, agreed to exchange lands in Mississippi for a domain in the West. *Choctaw Nation* v. *United States,* 119 U. S. 38. Article 2 of that treaty gives a description of the lands ceded to the Choctaws. See language quoted, subsection "A," statutes involved.

That the source of the Canadian was over 200 miles west of the 100th Meridian, was one of the findings by the Commission. See Finding 2.

A later treaty was concluded with the Choctaws under date of January 20, 1825 (7 Stat. 234), in the further effort to hasten the removal of the Indians to the west. The preamble of that treaty further confirms the grant made in the treaty of 1820. See quoted language in subdivision "b."

The next treaty is that of September 27, 1830 (7 Stat. 333). Referring to the domain ceded the language was:

> "* * * beginning near Fort Smith where the Arkansas boundary crosses the Arkansas River, running thence to the source of the Canadian fork; if in the limits of the United States, or to those limits; * * *."

There was no new consideration for this treaty, but the effect of the words "if" within the United States, was to cut out 6,589,000 acres from grant made by the treaty of 1820. The exchange of lands with the Indians had been accomplished by the treaty at Doak's Stand of 1820. *Choctaw Nation* v. *United States,* 119 U. S. 38, Ct. Clms. 34, p. 17. At this time the agents on the part of the United States knew that the source of the Canadian was not in the limits of the United States, as that was settled by a treaty with Spain, proclaimed after the Doak Stand Treaty of 1820.

The last treaty in point is that of June 22, 1855 (11 Stat. 611). Article 9 is given in part under "d" above.

That the Indians received no consideration for the quit-claim to this land found in the treaty of 1855 is not questioned. The Claims Commission made a specific finding in *Choctaw Nation* v. *United States,* Docket 16, involving the "Leased District" that no part of the money paid the Choctaws under the treaty of 1855 was paid for the quit-claim.

The Commission held, and the Court of Claims agreed, that *res judicata* applied because of the decision of this Court in *Choctaw Nation* v. *United States,* 179 U. S. 503. Petitioner contended that case did not apply for the reason that it involved different land, different treaty, and a different consideration.

The petitioner also relied on the fair and honorable dealing provisions of the Indian Claims Commission Act of

1946 (Sec. 5. 8) and the law announced in *The Western (Old Settlers) Cherokee Indians* v. *United States,* 114 Ct. Clms. 716, but the Court of Claims said that "if in fact the lands were not granted to it by the treaty of 1820, there was no lack of fair and honorable dealings in the United States taking a quit-claim conveyance from the appellant in the treaty of 1855 to put to rest an unfounded claim." Petitioner contends that the foregoing statement overlooks the indisputable fact that the grant in the treaty of 1820 by plain language gave to the Choctaws a domain extending west beyond the 100th Meridian to the headwaters of the Canadian. 34 Ct. Clms. 17. The treaty of 1825 reaffirmed the treaty of 1820 as to boundaries, and it was not until the treaty of 1830 was negotiated that the words "if in the limits of the United States" appear. That treaty was signed several years after the United States had made the treaty with Spain fixing the western boundary of the United States at the 100th Meridian and the purpose was to relieve the government of its obligation to give to the Indians the lands that had unquestionably been ceded in the 1820 treaty. There was no "if" in the Doak's Stand treaty. It was a grant of lands to the source of the Canadian. In thus denying petitioner's contention under the fair and honorable dealing clauses, the Court has proceeded on an erroneous statement as to the facts in this case.

Reasons for Granting the Writ.

1. It is believed the Court below was in error in sustaining the plea of *res judicata.* It was held that the issue herein presented was adjudicated by this Court in *Choctaw Nation* v. *United States,* 179 U. S. 494, 45 L. ed. 291, but that case did not involve the same land. It involved lands ceded to the United States by the treaty of April 26, 1866 (14 Stat. 769), quoted above, and an Act of Congress of March 2, 1895 (28 Stat. 876), quoted above, sending to the Court of Claims the question as to the rights, if any, of the Choctaws in lands assigned to the Kiowas and affiliated tribes, and commonly called the "Leased District." Thus, different lands, different considerations, different treaties and acts of Congress were involved. The ruling below is contrary to the decisions of this court.[1]

The case of *Choctaw Nation* v. *United States, supra,* relied upon to sustain *res judicata,* was sent to the Court of Claims by the Act of March 2, 1895 (28 Stat. 876), *supra,* to decide the single question as to the ownership of the lands between the 98th and 100th Meridian. The expressions of this Court as to the ownership of the lands west of the 100th Meridian were collateral to the issues in that case. Comments by the Court on collateral matters not actually in issue do not constitute *res judicata.* It was contended below that although the jurisdictional act referred only to lands between the 98th and 100th Meridians, the Choctaw Nation argued that it had title also to the lands west of the

1. In *North Carolina Railway Co.* v. *Story,* 268 U. S. 288, 69 L. ed. 959, it was said: "It is well settled that the principle of *res judicata* is only applicable to the point adjudged and not to points only collaterally under consideration, or incidentally under cognizance, or only to be inferred by arguing from the decree." (Citing numerous cases, including *Norton* v. *Larney,* 266 U. S. 51, 45 S. Ct. 145.)

100th Meridian and that therefore the expressions of the Court that the Nation had no such title to lands west of the 100th Meridian constitutes *res judicata*. We do not so understand the decisions of this Court.[2] The cause of action here sued upon is not the same as that involved in *Choctaw Nation* v. *United States*, 179 U. S. 502. The Court of Claims had no jurisdiction to try title to lands west of the 100th Meridian. No pleading in that case could have brought before the court the rights of this petitioner in the lands west of the 100th Meridian, as the Congress had only sent to the Court of Claims for decision the question as to the ownership of the lands between the 98th and 100th Meridian, known as the "Leased District." No decree was entered, none could have been entered that would dispose of the right of the Choctaws' lands west of the 100th Meridian. The doctrine of *res judicata* does not apply where the cause of action sued upon is not the same. *Cromwell* v. *Sac County*, 94 U. S. 351, 24 L. ed. 195. It does not apply to points which come under consideration only collaterally or incidentally. *Norton* v. *Larney*, 266 U. S. 511, 45 S. Ct. 145, 69 L. ed. 413.

In the Leased District case (179 U. S. 494) this Court in fact by its own comments stated that the argument about

2. In *Deposit Bank* v. *Board of Councilmen of Frankfort*, 191 U. S. 499, 48 L. ed. 276, this Court said: "When a plea of *res judicata* is interposed, based upon a former judgment between the parties, the question is not what were the reasons upon which the judgment proceeded but what was the judgment itself; was it within the jurisdiction of the court, between the same parties, and is it still in force and effect."

In *Southern Ry.* v. *United States*, 168 U. S. 1, this Court said: "It is, of course, well settled law that a fact, once decided in an earlier suit, is conclusively established between the parties in any later suit, provided it was necessary to the result in the first case." Restatement, Judgments, Sec. 68; *Campau Corporation* v. *Harrison*, 135 F. 2d 334; *Evergreen* v. *Nunn*, 141 F. 2d 927.

the ownership of the lands west of the 100th Meridian had no bearing on the issues presented in that case. See language at page 503.

If the two causes of action rest upon different states of facts, or if different proofs are required to sustain the two actions, a judgment in one is no bar to the maintenance of the other.[3] The making of any finding or the rendering of a decree as to lands other than those between the 98th and 100th Meridian was obviously wholly beyond the jurisdiction of the Court.[4]

In the briefs below the defendant relied upon *United States* v. *Southern Pacific Ry. Co.*, 259 U. S. 214, 66 L. ed. 907, in pressing the defense of *res judicata*. But that case is actually contrary to defendant's contention, and the Court did not cite it. The Court did cite *Title Insurance Co.* v. *United States*, 265 U. S. 472, 68 L. ed. 1110. That case had run its course through the state courts. No facts in that case are like the facts in this case. The case goes off on the question as to a rule of property.

The court below also cites *Florida Central Ry. Co.* v. *Schutte*, 103 U. S. 118, 26 L. ed. 327. In that case "the point was directly made by the pleadings and as directly passed upon by the court." So said this Court, but that is not true here as the court in this "Leased District" case

3. 30 Am. Jur., p. 198; 50 C. J. S., p. 69, Sec. 634. The first essential of *res judicata* is the identity of the matter in issue. The matter in issue is that matter upon which the plaintiff proceeds by his action and the defendant controverts by his pleadings. Bigelow on Estoppel, Vol. 1, p. 16; Chandler on *Res Judicata*, p. 35.

4. See *United States* v. *Walker*, 109 U. S. 266, 27 L. ed. 927, and *Norton* v. *Larney*, 266 U. S. 511, 69 L. ed. 413, holding that *res judicata* does not apply to matters that are collateral or matters over which the court has no jurisdiction. *Tait* v. *Western Maryland Ry. Co.*, 289 U. S. 620; *Safe-Cabinet Co.* v. *Globe Wernicke Co.*, 293 Fed. 568, 264 U. S. 586, 68 L. ed. 862.

had a total lack of jurisdiction to try titles to any lands other than those in the "Leased District."

2. Petitioner is entitled to proceed under the fair and honorable dealing clauses of the Indian Claims Commission Act, Clause 5, Section 2. The Choctaws received no consideration for the quit-claim found in the treaty of 1855. That has been judicially determined. See finding in U. S. Claims Commission Docket No. 16, in case *Choctaw Nation* v. *United States*. It has also been judicially determined by the Commission in its findings in this case that the source of the Canadian River was far beyond the 100th Meridian, and even to the 103rd Meridian. See Finding No. 2.

We respectfully call attention to the following mistaken basis on which the court below reached its conclusion. It was said: "If in fact the lands were not granted to it by the treaty of 1820, there was no lack of fair and honorable dealing in the United States taking a quit-claim conveyance from the appellant in the treaty of 1855 to put to rest an unfounded claim." The court is here in error. The 1820 treaty is as clear as language could make it. There was no "if" in the 1820 treaty. Article 2 of the 1820 treaty carried the grant up to the headwaters of the Canadian, without any qualifying language. And in this case the Commission has found that the source of the Canadian was far beyond the 100th Meridian.

Thus unquestionably the Choctaws originally got a domain extending beyond the 100th Meridian to the source of the Canadian by the treaty of 1820. They lost all beyond the 100th by virtue of two treaties, to-wit: (*1*) The wording of the 1830 treaty where it said "if within the limits of the United States"; and (*2*) the quit-claim in the treaty of 1855. No new consideration passed to the

Indians in either instance. This Court so held in *Choctaw Nation* v. *United States,* 119 U. S. 1, 30 L. ed. 318, as to the 1830 treaty. There it was said:[5]

And the Indian Claims Commission held in *Choctaw Nation* v. *United States,* Docket 16, that no consideration was paid for the quit-claim of 1855. And this Court in *Choctaw Nation* v. *United States,* 179 U. S. 494, said it was competent for the Indians to make the quit-claim. It was further said in the opinion by this Court that "after the treaty of 1855 it was not possible for the Choctaws to assert any claim to the lands west of the 100th degree of west longitude." That was, of course, because of the quit-claim, for which no consideration was passed to the Indians.

To sum up: The Indians gave up their lands in Mississippi for the domain in the west under the treaty of 1820; that domain was delineated by the treaty of 1830 (for which no consideration was paid); and finally were foreclosed from asserting any claim to the lands west of the 100th Meridian by reason of the quit-claim in the 1855 treaty. These indisputable facts make out a case coming under the fair and honorable dealing clauses of the Indian Claims Commission Act. A full review of all the transactions surrounding these early treaties is found in *Choctaw Nation* v. *United States,* 34 Ct. Clms. 17.

The opinion of the court below was clearly in error when it said: "The Supreme Court considered and decided the very question which the appellant would have the Indian Claims Commission decide again, and differently."

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5. "The most notable thing, upon a careful consideration of the terms of this treaty, is that no money consideration is promised or paid for a cession of lands, the beneficial ownership of which is assumed to reside in the Choctaw Nation, and computed to amount to over ten million acres. It was not an exchange of lands east of the Mississippi River for lands west of that river. The latter tract had already been secured to them by its cession under the Treaty of 1820."

This Court did not decide the question. It had no jurisdiction to decide it. It entered no decree and could not have entered any decree as to the lands here in controversy. The reasoning and opinion of the court are not *res judicata* unless the subject matter in issue be definitely disposed of by the decree. *North Carolina Railroad* v. *Story, supra.*

3. The questions involved are of importance in construing the provisions of the Indian Claims Commission Act of August 13, 1946, 60 Stat. 1049, 25 U. S. C. A., Sec. 70.

4. The decisions of the Court of Claims are in conflict. In *The Western (Old Settlers) Cherokee Indians* v. *United States,* 114 Ct. Clms. 716, it was held the Indians were not barred by the former decision. To same effect is *Chickasaw Nation* v. *United States,* 132 Fed. Supp. 199.[6] But to the contrary are *Choctaw Nation* v. *United States,* 128 Ct. Clms. 195, 121 Fed. Supp. 206, and this case. It is believed that the Court of Claims was right as to the law announced in *The Western (Old Settlers) Cherokee Indians* v. *United States* and in the *Chickasaw* case, but the court failed to follow its own decisions, in this case.

Wherefore, Petitioner asks that a writ of *certiorari* issue to review the judgment below.

Respectfully submitted,

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6. See also *Osage Nation* v. *United States,* 119 Ct. Clms. 592.

APPENDIX.

IN THE UNITED STATES COURT OF CLAIMS

(Decided November 8, 1955)

Appeal No. 4-54

THE CHOCTAW NATION v. THE UNITED STATES

Mr. W. F. Semple for the Appellant. Mr. Wesley E. Disney was on the brief.

Mr. Robert E. Fraley, with whom was Mr. Assistant Attorney General Perry W. Morton, for the appellee.

ON APPEAL FROM THE INDIAN CLAIMS COMMISSION

MADDEN, Judge, delivered the opinion of the court:

The appellant sought, before the Indian Claims Commission, to recover the value of 6,589,000 acres of land lying between the Canadian and Red Rivers, and extending from the 100th meridian, west longitude, more than 200 miles to the west. The appellant claims that it became the owner of this land by a grant from the United States in the treaty of Doak's Stand of October 18, 1820, 7 Stat. 210, and that it conveyed it to the United States by the treaty of June 22, 1855, 11 Stat. 611, receiving no consideration for its conveyance.

The Government's position is that the appellant never owned the land in question; that the Supreme Court of the United States so decided in prior litigation between the appellant and the United States, 179 U. S. 494; and that that decision makes the instant claim *res adjudicata*. The Indian Claims Commission sustained the Government's plea of *res adjudicata* and dismissed the appellant's petition. The appellant has brought the case here, insisting that the dismissal of its petition was erroneous.

The prior suit, the decision in which was held by the Indian Claims Commission to be a bar to the present one,

was not a suit for the land with which the present case is concerned. It related to lands lying east of the 100th meridian. The reason why the Supreme Court considered, in that case, the Choctaws' claim of ownership of the land lying west of the 100th meridian, is stated in the Court's opinion as follows, 179 U. S. at page 503:

> The Choctaws also contend that they once owned, by transfer from the United States, a vast body of lands west of the Leased District, for which they have never received anything, and that the treaty of 1866 must be interpreted in the light of that fact. What connection such a fact, if it had any existence, could have with the construction of the treaty of 1866 it is not easy to perceive. But as the proposition just stated was the subject of much consideration in the Court of Claims, and as it is earnestly pressed upon our attention, we will first inquire whether the Choctaws ever owned any lands west of the Leased District, that is, west of the 100th degree of west longitude, and then bring into view the circumstances leading up to the treaty of 1866 which, it is argued, throw light on its interpretation. This being done, we will examine the provisions of that treaty so far as they bear upon the title to the particular lands in dispute.

The opinion then devotes eight pages to the consideration of the question and comes to the definite conclusion that the Choctaws did not at any time own the lands west of the 100th meridian. As is apparent from the quoted statement, and from the decision of this court, 34 C. Cls. 17, the Choctaws, in the former case, presented the question of their ownership of the lands involved in the instant case for decision, not because that was the ultimate question to be decided in the former case, but because they thought that if they could establish ownership of those lands, it would be strong evidence to support their interpretation of the treaty there involved. They persuaded this court that they did own the lands west of the 100th meridian, and the fact of that

ownership was a factor in inducing this court to interpret the treaty there in question as they wanted it interpreted. They pressed the same arguments upon the Supreme Court, but did not succeed in convincing that Court. The Supreme Court also decided the ultimate question against them. It might have done so even if it had found that they had owned the lands west of those there in question. From the statement above quoted "What connection such a fact, if it had any existence, could have with the construction of the treaty of 1866 it is not easy to perceive," it may be inferred that the Court's conclusion on the intermediate fact did not affect its ultimate decision.

However that may be, the Choctaws presented the question for decision, it received detailed and careful consideration and was, in fact decided. We think they have had their day in court on the question. We think the situation is fairly comparable to that of a prior decision which is rested on two grounds. Although the decision would probably have been the same if either one of the grounds had been lacking, yet that does not make both or either of the grounds *obiter dictum. United States* v. *Title Insurance and Trust Company,* 265 U. S. 472, 486. The situation is also comparable to that of a case in which a court considers and decides a question presented to it as one step in the logical development of its ultimate decision. It then passes on to the next question, and its decision of that question is such that the ultimate decision would have been the same if the preceding question had not been decided at all, or had been decided the other way. But the question was presented and decided and is *res adjudicata. Railroad Companies* v. *Schutte,* 103 U. S. 118, 143.

The appellant urges that, even if the other requirements for *res adjudicata* were fulfilled, the doctrine is not applicable in this case because the law has been changed since the prior decision. The appellant says that the Indian Claims Commission Act of 1946, by its clause (5) of Section (2) which permits recovery on the basis of fair and honorable

dealings, has changed the applicable law since the prior decision of the Supreme Court. See *The Western (Old Settler) Cherokee Indians* v. *United States,* 114 C. Cls. 716.

As we have said, the appellant claims that it acquired the lands involved in this suit by grant from the United States in the treaty of 1820 and that it granted them back to the United States without consideration in the treaty of 1855. If in fact the lands were not granted to it by the treaty of 1820, there was no lack of fair and honorable dealing in the United States taking a quit-claim conveyance from the appellant in the treaty of 1855 to put to rest an unfounded claim.

The treaty of 1820 contained the expansive language about the source of the Canadian river, which was more than 250 miles west of the 100th meridian. In 1819 a treaty had been made with Spain recognizing the lands west of the 100th meridian as Spanish territory. This treaty was not ratified until 1821.

In the prior case the Supreme Court said, 179 U. S. at page 508:

> It cannot be doubted that the purpose of Article 2 of the treaty of 1830 was to provide for a special grant to the Choctaws of the lands intended to be ceded to them by Article 2 of the treaty of 1820, and no others. It was as if the parties declared that the words in the treaty of 1820, "thence up the Arkansas to the Canadian Fork, and up the same to its source, thence due south to the Red River," should be held to mean the same as the words in the treaty of 1830, "thence to the source of the Canadian Fork, *if* in the limits of the United States, *or to those limits, thence* due south to Red River." The treaty of 1830 plainly imports the understanding of the parties at that time that whatever might be the wording of the treaty of 1820, the United States had not thereby intended to grant, and the Choctaws had not thereby expected to receive, any lands at or near the source of the Canadian Fork unless that

point was within the limits of the United States—that both parties had in view at that time only lands within the limits of the United States.

As the treaty of 1820 provided that the Choctaws should have lands as far west as the source of the Canadian River, it is suggested that the United States could not legally modify that provision by the subsequent ratification in 1821 of the treaty with Spain signed in 1819. But it was entirely competent for the parties, without any new or valuable consideration intervening, to rectify a mistake in the description of boundaries, and to agree, as in effect they did by the treaty of 1830, that the words "to the Canadian Fork, and up the same to its source," in the treaty of 1820, were to be interpreted as meaning "to the source of the Canadian Fork, if in the limits of the United States, or to those limits"—thus relieving the United States from any obligation to make a special grant to the Choctaws of lands which by the treaty with Spain, ratified in 1821, had been recognized as part of Spanish territory. After the treaty of 1830 the line "thence due south to the Red River" was to be taken as running from a point on the dividing line between the United States and Spain, the 100th degree of west longitude as established by the treaty of 1819-1821, *thence due* south to that river.

Thus the Supreme Court considered the intention of the parties to the treaty of 1820, and decided that they did not intend, in spite of the language which they used, that the grant should extend west of the 100th meridian. On that assumption, the Government's acceptance, without any separate consideration, of the appellant's quit claim in 1855 of its then asserted title, the only foundation of which was some language used by mutual mistake, involved no lack of fair and honorable dealing.

The Supreme Court considered and decided the very question which the appellant would have the Indian Claims

Appendix

Commission decide again, and differently. We think the Commission was correct in sustaining the Government's plea of *res adjudicata* and we affirm its decision.

It is so ordered.

LARAMORE, Judge; WHITAKER, Judge; LITTLETON, Judge; and JONES, Chief Judge, concur.

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 111

THE CHOCTAW NATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Claims (R. 3-7; Pet. App. 13-18) is reported at 135 F. Supp. 536. The opinion of the Indian Claims Commission appears at R. 39-58.

JURISDICTION

The judgment of the Court of Claims was entered on November 8, 1955 (R. 3-7). A motion for a new trial filed by the petitioner on December 7, 1955, was denied on January 31, 1956 (R. 9). On

April 18, 1956, petitioner's time within which to file a petition for certiorari was extended by the Chief Justice to May 25, 1956. The petition for a writ of certiorari was filed on that date. The jurisdiction of this Court is invoked under 28 U. S. C. 1255.

QUESTIONS PRESENTED

1. Whether the Indian Claims Commission and the Court of Claims correctly held that petitioner's attempt to recover the value of lands which it allegedly owned is barred by this Court's prior determination, in earlier litigation between petitioner and the United States, that petitioner did not in fact own such lands.

2. Whether the Indian Claims Commission and the Court of Claims properly held that the petitioner did not have a cause of action arising under the so-called "fair and honorable dealings" clause of the Indian Claims Commission Act (Act of August 13, 1946, Sec. 2, cl. 5, 60 Stat. 1049, 1050, 25 U. S. C. 70a).

STATUTE INVOLVED

Section 2 of the Indian Claims Commission Act of August 13, 1946, 60 Stat. 1049, 1050, 25 U. S. C. 70a, in pertinent part provides as follows:

> SEC. 2. The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska: (1) claims in law or equity arising under the Constitution,

laws, treaties of the United States, and Executive orders of the President; (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit; (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; (4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity. * * *

All claims hereunder may be heard and determined by the Commission notwithstanding any statute of limitations or laches, but all other defenses shall be available to the United States.

STATEMENT

Petitioner commenced this action before the Indian Claims Commission by filing a complaint which sought to recover the value of 6,589,000 acres of land lying west of the 100th meridian, claiming that it was granted such lands by the Treaty of

Doak's Stand of October 18, 1820, 7 Stat. 210 (R. 1-4). The complaint prayed judgment in the principal sum of $1,647,250.00, with interest thereon at the rate of 4% per annum from February 18, 1821, until paid (R. 4).

The United States answered, stating, *inter alia*, as its first of three defenses, that (R. 5):

> The petition should be dismissed for the reason that it contains no genuine issue respecting any material fact, the same having been heretofore judicially determined on its merits and the matter is *res judicata* by reason of the former decision in the United States Supreme Court in *United States* v. *Choctaw Nation*, 179 U. S. 494.

The facts may be summarized as follows:

Pursuant to a jurisdictional act of Congress, petitioner, in 1895, filed a petition in the Court of Claims wherein it sought to recover compensation for certain lands, within what was known as the "Leased District," held by the tribe under the Treaty of Doak's Stand of October 18, 1820, 7 Stat. 210, and allegedly taken by the United States without adequate compensation therefor, in violation of an alleged trust supposedly created by the treaties dated June 22, 1855, 11 Stat. 611, and April 28, 1866, 14 Stat. 769.

The fundamental question to be determined in the earlier case arose out of the treaty last cited, whereby the Choctaws and the Chickasaws, in con-

sideration of the sum of $300,000.00, ceded to the United States the territory known as the "Leased District." The Government contended that this cession was absolute, unconditional, and unaccompanied by any trust upon the termination or abandonment of which the Indians would be entitled either to the territory ceded or to the proceeds of its sale. The Choctaw and Chickasaw Nations denied that this was the effect of the Treaty of 1866, and contended that the United States took the lands in trust to be used only for the settlement of Indians, and that on the abandonment of such trust the lands reverted to the Choctaws and Chickasaws.

In this connection, petitioner alleged ownership and asserted title to lands lying west of the 100th meridian (which are the same lands as described in paragraph 4 of the petition in the present case), and alleged further that their rights and interest under the treaties of 1855 and 1866 had to be interpreted in the light of such fact. The question of petitioner's title to the lands here involved thus became a material issue in the earlier case and was dealt with at length by the parties, the Court of Claims, and by this Court. This Court expressly declared its intention to "inquire whether the Choctaws ever owned any lands west of the Leased District, that is, west of the 100th degree of west longitude * * *" (179 U. S. at p. 503). It considered the matter in detail, and determined that petitioner had no title, ownership or valid claim in the lands described and was estopped from asserting such claim.

In an opinion dated March 8, 1954 (R. 39-58), after setting forth at length the proceedings in the former case and reviewing the applicable law, the Indian Claims Commission held that the former adjudication by this Court bars re-opening the question of title to the lands west of the 100th meridian. Petitioner prosecuted an appeal to the Court of Claims. On November 8, 1955, that court delivered its opinion (R. 3-7). It outlined the former proceedings and decision by this Court and unanimously affirmed the judgment of the Indian Claims Commission sustaining the Government's plea of *res judicata*. Both the Commission and the Court of Claims also held that petitioner had no valid claim under the "fair and honorable dealings" clause of the Indian Claims Commission Act.

ARGUMENT

1. Petitioner argues that the decision of this Court in *United States* v. *Choctaw & Nations*, 179 U. S. 494, decided "the single question as to the ownership of the lands between the 98th and 100th Meridian" and that "[t]he expressions of this Court as to the ownership of the lands west of the 100th Meridian [the lands involved in the instant case] were collateral to the issues in that case" (Pet. 7). But as both the Indian Claims Commission and the Court of Claims make clear, with abundant supporting details (see, *e. g.*, R. 4-5, 44-48; Pet. App. 14-15), the question of petitioner's ownership of the lands here in issue was tendered by petitioner in the earlier case, was fully

litigated in that case, and was ultimately decided by this Court. Petitioner's theory in the earlier suit was that its claim to lands east of the 100th Meridian was supported by its asserted ownership of lands west of that meridian.[1] Both assertions of ownership were denied by the Government. As the Indian Claims Commission stated in reviewing the earlier litigation, "issue on the claim as to the ownership of the lands west of the 100th meridian was . . . joined" (R. 44).

The issue as to the lands west of the meridian was fully reviewed in this Court because that was one of the principal grounds upon which petitioner urged a right to recover the lands to the east. The Court expressly stated that it would "inquire whether the Choctaws ever owned any lands west of the Leased District, that is, west of the 100th degree of west longitude . . ." (179 U. S. at 503). It proceeded to do so at length, devoting eight pages of its opinion to an examination of the relevant statutes, treaties, agreements, and questions of fact (pp. 503-510). Applying the law to the facts as determined in the litigation, it concluded unequivocally that the Choctaws never owned any land west of the 100th Meridian.

Petitioner's claim here rests upon the identical facts and the same historical transactions as to

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[1] Contrary to petitioner's suggestion (Pet. 12), it is obvious that the Court had jurisdiction to determine all issues made the basis of the claim for recovery. For that purpose, it is immaterial that the lands subject to the judgment entered in the first case were located east of the 100th Meridian.

which this Court declared the law more than fifty years ago. As previously emphasized, the contention which is made in the instant case was tendered by petitioner in the earlier case. It was fully developed and fully considered. As the Court stated at the time, it was the "subject of much consideration in the Court of Claims" and "is earnestly pressed upon our attention" (p. 503). Since the claim was made and fully litigated in the first case, involving the same parties, it seems clear that petitioner has had its day in court and that the law as applied to the facts must be deemed conclusively established. "[A] right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified." *Southern Pacific Railroad* v. *United States*, 168 U. S. 1, 48-49.[2]

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[2] This principle of estoppel has been applied frequently to claims arising under the Indian Claims Commission Act. *Assiniboine Indian Tribe* v. *United States*, 128 C. Cls. 617, 121 F. Supp. 906, certiorari denied, 348 U.S. 863; *Blackfeet and Gros Ventre Tribes of Indians* v. *United States*, 127 C. Cls. 807, 119 F. Supp. 161, certiorari denied, 348 U.S. 835; *Western Cherokee Indians, et al.* v. *United States*, 116 C. Cls. 665, 89 F. Supp. 1006, certiorari denied, 340 U.S. 904. Indeed, the Act expressly reserves to the United States all defenses save limitations and laches (*supra*, p. 3).

2. Petitioner's arguments based on the so-called "fair and honorable dealings" clause of the Indian Claims Commission Act must likewise fail. This Court has already determined that "the Choctaws had no claim, legal *or equitable*, to territory west of the 100th degree of west longitude . . ." (179 U. S. at 517; emphasis added). As the Indian Claims Commission stated it (R. 57):

> The Supreme Court definitely decided that the claimed lands west of the 100th meridian were without the boundaries of the lands described in the 1820 treaty and therefore the Choctaw never acquired the same. This determination is, as we have held, binding upon us, so there was nothing upon which fair and honorable dealings might operate. * * *

The Commission also pointed out (R. 56) that "[n]o moral claim has, by any stretch of reasoning, been pleaded or intimated, nor has the so-called fair and honorable dealings clause of the Indian Claims Commission Act even been remotely mentioned."[3]

3. The "conflict" consideration governing review on certiorari refers to conflict between courts of appeal or with applicable decisions of this Court (Rule 19 of the Revised Rules of this Court) and not to any "conflict" between various decisions of a single court (cf. Pet. 12). In any event, the question as to what is established by prior litigation is

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[3] The Court of Claims similarly rejected the argument based upon this clause. Pet. App. 15-17.

dependent upon the facts of each case, and the Court of Claims' opinions cited by petitioner (Pet. 12) reflect no different view of the law from that expressed here.

CONCLUSION

Petitioner has had its day in this Court on the very matter here presented. The decisions of the two lower tribunals are thus clearly correct. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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